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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
NO. A-809

WARREN W. WYNEKEN, ESQ., PRO SE, *Petitioner,*

vs.

HARRY W. SCOTT, JOSEPH M. JOHNSON,
and CHARLES E. WELLS, *Respondents.*

BRIEF OF CHARLES E. WELLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions presented by Petitioner constitute a "federal question" that would provide a jurisdictional basis for review by this Court, and, if so, whether a "federal question" was timely raised by Petitioner.

PARTIES TO THE PROCEEDINGS

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2. Petitioner's appeal, in its simplest terms, is that the Trial Court improperly excluded certain evidence in a claim for breach of contract and for tortious interference with contractual relation. Such an exclusion, even if erroneous, does not qualify as a "federal question" that would provide

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Seaboard A.L. Railway v. Padgett (1915)
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Swearingen v. St. Louis (1902) 185 U.S. 38,
46 L.Ed. 795, 22 S.Ct. 569. 8

BASIS FOR JURISDICTION

Respondent Wells believes there is no basis for jurisdiction and that Petitioner's invocation of 28 U.S.C. §1257 is misplaced.

CONCISE STATEMENT OF BASIS FOR JURISDICTION

Again, Respondent Wells believes there is no jurisdictional basis for review by this Court. Petitioner's argument on appeal is that the State Trial Court erroneously prevented him from introducing certain evidence at trial. The exclusion of evidence in a civil trial does not constitute a "federal question." Moreover, Petitioner has only now, in an effort to confer jurisdiction on this Court, attempted to "remold" his argument in constitutional terms.

STATEMENT OF THE CASE

This appeal arises out of a lawsuit initiated by attorney Warren W. Wyneken against his former client, Charles E. Wells, and against attorneys Harry W. Scott and Joseph M. Johnson. Wyneken brought suit against Wells for an alleged breach of contract, and Wells counterclaimed, alleging legal negligence and abuse of process. Wyneken also brought suit against Scott and Johnson for alleged tortious interference with contractual relations, and Scott and Johnson counterclaimed, alleging abuse of process.

The parties were involved in prior litigation which ultimately led to the filing of this lawsuit. In

order to understand the issues raised by Wyneken in this appeal, it is necessary to briefly discuss the facts surrounding the prior litigation.

The Cincinnati Insurance Company paid a $175,000 claim as a result of a fire at the home of Carl Larry Moon. Thereafter, as subrogee of Moon, the insurance company filed suit in December 1986 against Wells, a heating and cooling contractor who had installed a wood-burning furnace in Moon's home in 1981. The insurance company alleged that the fire at the Moon residence was a result of faulty installation of the furnace by Wells.

Wells, who was uninsured, hired Wyneken to defend him in the suit brought by the insurance company. On behalf of Wells, Wyneken filed a counterclaim against the insurance company, alleging abuse of process. Wyneken believed that there was ample evidence that the fire was the result of Moon's misuse of the furnace and that there was reason to believe that the Cincinnati claim was based on a fictitious fire investigation since Cincinnati settled with the general contractor, Bob Berning, for 7% of the claimed loss [of $175,000] even though Berning was fully insured. Wyneken also claimed that he knew that the entire case as filed by the Cincinnati Insurance Company was without legal basis and that the then attorney representing Cincinnati, Mark Baeverstad, having knowingly procured a false fire report from Cincinnati's fire investigator, had filed the suit in an attempt to fraudulently procure a settlement with Wells' believed insurance company.

Wyneken hired attorney Harry Scott to assist him as local counsel at trial because trial was to be

held in the county where Scott practiced. After many delays, the trial in the Cincinnati v. Wells matter was scheduled for January 6, 1992. Wyneken intended to argue the issue of insurance coverage at trial, but the judge ruled that he could not do so. Nonetheless, during the course of his opening statement, Wyneken told the jury that Wells had come to see him because Wells did not have insurance at the time of the fire. Counsel for the insurance company successfully moved for a mistrial.

Wells, who was upset with Wyneken after the mistrial was declared, called Scott at home the evening of January 6, 1992. Scott suggested that Wells calm down, think it over, and discuss the matter with Wyneken. Four days later, Wells discharged Wyneken. Wells asked Scott to assist him in finishing the Cincinnati v. Wells litigation, and Scott asked his partner, Joseph Johnson, to review the files. Scott and Johnson ultimately agreed to help Wells. The insurance company eventually dropped its subrogation claim against Wells and paid him $9,000.

Wyneken thereafter filed this lawsuit against Wells, Scott, and Johnson. Wyneken alleged in his complaint that Wells, in concert with Scott and Johnson, wrongfully terminated his contract with Wyneken for legal services. Wyneken also alleged in his complaint that Scott and Johnson wrongfully interfered with the contractual relationship between himself and Wells, but did not allege the existence of an agency relationship between himself and Scott or that Scott violated any duties associated with any such agency relationship.

During pretrial proceedings on March 29, 1996,

the trial court ruled that it would not allow Wyneken to retry the Cincinnati v. Wells case in this matter. Believing that the Cincinnati v. Wells case involved issues essential to this case, Wyneken thereafter sought an order that would allow him to present as evidence in this case a substantial amount of evidence from the Cincinnati v. Wells case. In his motion before the trial court, Wyneken stated in pertinent part:

> The Cincinnati v. Wells case was interrupted by a finding of a mistrial and immediately reset for trial in August of 1992. Wyneken has alleged that although Wells had a legal right to discharge him, irrespective of the reason, Well'[s] counterclaim of abuse of civil process was so strong as to virtually assure Wells of a favorable verdict. Further, that Harry W. Scott owed Wyneken a duty as his agent, to help restore the relationship Wyneken had with Wells. Properly handled by Scott, the prior case had a great likelihood of resumption with ultimate success for Wells.

Record at 83-84. Wyneken also argued that (1) he had explicitly set forth his position in this case in his statement of claims and contentions, which had been filed with the court more than a year before and which had been included in at least one draft pretrial order supplied to all counsel, (2) defendants recognized the validity of his position and the relevance of such evidence and had not previously objected to the inclusion of the prior litigation in this case. Wells,

Scott, and Johnson filed motions in limine, requesting that the court deny Wyneken's motion.

The matter was ultimately tried in two phases in the Adams Circuit Court in the State of Indiana. The first phase of the jury trial involved Wyneken's claim against Wells, Scott, and Johnson. After the jury rendered a verdict in favor of Wells, Scott, and Johnson in the first phase of the trial, the second phase of the trial involved the counterclaims against Wyneken. The jury returned verdicts in favor of Wells, Scott, and Johnson in the second phase of the trial.

On June 14, 1996, the trial court entered a final judgment based upon the jury's verdicts. Costs were assessed against Wyneken, and Wyneken was ordered to pay Wells $90,000 in compensatory damages and $250,000 in punitive damages. The final judgment also ordered that Wyneken pay Scott and Johnson $45,000 in compensatory damages and $100,000 in punitive damages.

Wyneken appealed the matter to the Indiana Court of Appeals, asking the Court to set aside the jury verdict. The Indiana Court of Appeals, in a Memorandum Decision-Not for Publication, affirmed the Trial Court and the jury verdict. App. 4. The Court ruled that admission or exclusion of evidence is a matter entrusted to the sound discretion of the trial court and that Wyneken had failed to create a sufficient record by way of offer of proof to allow the Court of Appeals to conclude that the Trial Court's exclusion of evidence from the Cincinnati v. Wells case constituted an abuse of discretion. Thereafter, Wyneken petitioned for rehearing and was denied. He

subsequently sought transfer to the Indiana Supreme Court and the Indiana Supreme Court denied transfer. App. 5. Wyneken now asks this Court to grant Certiorari, in essence, to review the Trial Court's exclusion of evidence.

ARGUMENT

1. **Petitioner suggests that this Court has jurisdiction to hear his appeal pursuant to 28 U.S.C. §1257 and Amendment V of the Constitution of the United States. Since Petitioner's Petition for Writ of Certiorari is the first time Petitioner has attempted to raise a "federal question" issue, such issue is not timely raised and cannot be considered by this Court.**

Petitioner's claims and arguments throughout these proceedings have been difficult to distill and discern. What is clear, however, is that **not once** has Petitioner attempted to frame his arguments in constitutional terms prior to this effort to seek Certiorari. Petitioner's Tables of Cases, Statutes, and Other Authorities in his Brief before the Indiana Court of Appeals, in his Petition for Rehearing before the Indiana Court of Appeals, and in his Petition to Transfer to the Indiana Supreme Court are completely devoid of any reference to the United States Constitution or any other Federal legislation. Petitioner's Briefs at each of those levels, as well, are without reference to the United States Constitution or any Federal legislation. In Petitioner's Petition for Writ of Certiorari, he simply asserts that this Court has jurisdiction under 28 U.S.C. §1257 and the 5th

Amendment to the United States Constitution which provides, in part, "no person shall be...deprived of...property without due process of law...." Petitioner makes no effort to even try to demonstrate how the Trial Court's exclusion of evidence constitutes a deprivation of property without due process but, instead, simply asserts that it did. This Court's power to review cannot arise from a mere assertion of a federal right. Seaboard A.L. Railway v. Padgett (1915) 236 U.S. 668, 59 L.Ed. 777, 35 S.Ct. 481.

Respondent Wells understands and acknowledges that this Court, in its discretion, may review cases in which a State Court of last resort has decided an important Federal question in a way that conflicts with the decision of another State Court of last resort, of a United States Court of Appeals, or of this Court. Rule 10(B) and (C). The Indiana Supreme Court, however, did not decide an important Federal question in a way that conflicts with any other State Court or any Federal Court. A quick review of the opinion of the State Court of Appeals shows that the Court did not decide any federal question as no federal question was presented.[1] Petitioner cannot be heard to claim that the State Court of last resort incorrectly decided a federal question when no federal question was presented to it. Similarly, this Court cannot entertain jurisdiction where a federal question has neither been raised nor decided in the State Court. Lynk v. LaPorte Superior Ct. No. 2 (1986, CA7 Ind.) 789 F2d 554. A federal question which is relied upon

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[1] The Indiana Supreme Court denied transfer. Appendix 5. As such, the Court of Appeals' opinion is the controlling order in this case. Appendix 4.

to confer jurisdiction on this Court cannot be raised for the first time in the Supreme Court of the United States. Spies v. Ill. (1887) 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 22; Quimby v. Boyd (1888) 128 U.S. 488, 32 L.Ed. 502, 9 S.Ct. 147; Morrison v. Watson (1894) 154 U.S. 111, 38 L.Ed. 927, 14 S.Ct. 998; Scudder v. Comptroller of N.Y. (1899) 175 U.S. 32, 44 L.Ed. 62, 20 S.Ct. 29; Chapin v. Frye (1900) 179 U.S. 127, 45 L.Ed. 119, 21 S.Ct. 71; Swearingen v. St. Louis (1902) 185 U.S. 38, 46 L.Ed. 795, 22 S.Ct. 569; Rogers v. Clark Iron Co. (1910) 217 U.S. 589, 54 L.Ed. 865, 30 S.Ct. 693. Given the fact that Petitioner has only now, in his Petition for Writ of Certiorari, attempted to articulate his argument in the form of a federal question, Respondent Wells respectfully submits that this Court is without jurisdiction to hear Petitioner's appeal.

2. **Petitioner's appeal, in its simplest terms, is that the Trial Court improperly excluded certain evidence in a claim for breach of contract and for tortious interference with contractual relation. Such an exclusion, even if erroneous, does not qualify as a "federal question" that would provide a jurisdictional basis for review by this Court.**

Petitioner claims that the Trial Court erred in refusing to allow him to present evidence from the Cincinnati v. Wells matter at trial of the Wyneken v. Scott, Johnson and Wells matter. When the Trial Court excludes evidence, the proponent of evidence is obviously required to make an offer of proof in order to preserve the ruling for appellate review. Paullus v. Yarnell, 633 N.E.2d 304 (Ind.Ct.App.

1994), *trans. denied*. Such an offer allows an Appellate Court to consider the propriety of the Trial Court's decision excluding the evidence and, as such, the offer must reveal the substance, purpose, relevancy, and materiality of the excluded evidence. *Id*. Petitioner made no offer of proof at trial regarding the evidence from the Cincinnati v. Wells case that he wanted to present and, here, concedes that he made no offer because it would have been burdensome to do so.[2] Petition for Writ, p. 5. Petitioner has not stated to this Court, nor did he share with any of the Courts of Appeal in Indiana, exactly what evidence he sought to have admitted and how it was in any way relevant in a case involving allegations of breach of contract and tortious interference with contractual relation.[3]

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[2] Petitioner attempts to argue that he was precluded from presenting a cause of action at trial. It is difficult to conceive how a cause of action would be presented other than by way of presentation of facts or evidence establishing such a cause. Regardless of the nomenclature Petitioner wishes to employ, whether "cause of action," "facts," or "evidence," a State Trial Court's ruling on exclusion or admissibility is within its sound discretion. Moreover, when a decision is made to exclude, the offering party is required to make an offer of proof so that a reviewing court might properly examine whether the exclusion was an abuse of discretion. Here, a quick review of the decision by the Indiana Court of Appeals, App. 4, reveals that Petitioner failed completely to undertake the effort to make such an offer of proof.

[3] At page 5 of his Petition for Writ, Petitioner states that Respondent Wells' counsel: "...Bleeke had falsely contended that these opposing counsel '...addressed the trial court regarding that issue by way of a Motion in Limine...'" Although the allegation is not germane to the Court's decision here, Respondent Wells wishes to address a clear misstatement of fact by Petitioner as required by Supreme Court Rule 15.2.

Petitioner seeks to argue that the jury verdict rendered against him constitutes a deprivation of property without due process. Petitioner received due process. He had an opportunity to present his claim against Respondents Scott Johnson, and Wells, to a jury and a jury found against him. His only argument on appeal is that he was not allowed to present all the evidence in support of his claim that he wished to present.

This Court's Rules clearly state that:

> A Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rules, Rule 10.

Here, the Indiana Court of Appeals stated that the admission or exclusion of evidence is a matter which is entrusted to the sound discretion of the Trial Court. Paullus, 633 N.E.2d 304. Petitioner does not and cannot argue that the Indiana Courts of Appeal misstated the Rule regarding exclusion of evidence.

Counsel for Scott, Johnson, and Wells did, indeed, address the Trial Court by way of Motion in Limine regarding their belief that Wyneken would improperly attempt to insert into the trial of the Wyneken v. Scott, Johnson, and Wells matter, irrelevant evidence from the Cincinnati v. Wells matter. Petitioner, in fact, acknowledges, concedes, and states that such Motions in Limine were filed a mere four lines later in his Petition where he states: "Following the ruling by the court in the present case, backed up by Motions in Limine, numerous successful objections were made." Petitioner's Writ, p. 5.

He can only argue that the Trial Court and Courts of Appeal misapplied that Rule. That argument neither constitutes a federal question nor does it suffice as a basis for this Court granting Petitioner's Petition for Writ.

CONCLUSION

Respondent Wells respectfully requests that the Court deny Petitioner's Petition for Writ of Certiorari.

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